Supreme Court, U. S.
FILED
MAY 24 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1978
No. 78-1620

PEQUEA VALLEY SCHOOL DISTRICT,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF EDUCATION,
Appellee

On Appeal From the Supreme Court of Pennsylvania

MOTION TO DISMISS OR AFFIRM

PATRICIA A. DONOVAN
Deputy Attorney General
NORMAN J. WATKINS
Deputy Attorney General,
Chief of Civil Litigation
EDWARD G. BIESTER, JR.
Attorney General
Counsel for Appellee

Office of the Chief Counsel
Pennsylvania Department of Education
Box 911
Harrisburg, PA 17126
Telephone: 717—787-6725
May 22, 1979

Murrelle Printing Co., Box 100, Sayre, Pa. 18840—(717) 882-0401

TABLE OF CONTENTS

	PAGE
Statute Involved	1
Question Presented	2
Statement of the Case	3
Motion To Dismiss	5
Motion To Affirm	8

TABLE OF CITATIONS

CASES:

Americans United for Separation of Church and State v. Benton, 413 F. Supp. 995 (S.D. Iowa, 1975)	5, 6
Everson v. Board of Education of Ewing Township, N.J., 330, U.S. 1 (1946)	5, 6, 8
Lemon v. Kurtzman, 403 U.S. 602 (1971)	7
Members of the Jamestown Committee v. Schmidt, 427 F. Supp. 1338 (D. R.I., 1977)	6
Pequea Valley School District v. Commonwealth of Pennsylvania, Department of Education, 397 A.2d 1154 (1979)	4
Rhoades v. School District of Abington Township, 389 U.S. 11 (1967)	8
Walz v. Tax Commission, 397 U.S. 664 (1970)	6, 8

Wolman v. Walter, 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed. 2d 714 (1977) 8

Womell v. Matters, 389 U.S. 46 (1967) 8

STATUTE:

Act of December 29, 1972, P.L. 1726, No. 372, amended Section 1361 of the Public School Code of 1949, Act of March 10, 1949, P.L. 30, Article XIII, as amended, 24 P.S. Section 13-1361 ..... 1, 3, 5

MOTION TO DISMISS OR AFFIRM

The Appellee in the above entitled case moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment of the Supreme Court of Pennsylvania on the ground that the federal question sought to be reviewed was correctly decided by the court below.

STATUTE INVOLVED

Pennsylvania's Act 372 of 1972 (Act of December 29, 1972, P.L. 1726, No. 372, amended Section 1361 of the Public School Code of 1949, Act of March 10, 1949, P.L. 30, Article XIII, as amended, 24 P.S. Section 13-1361) is set out verbatim in Appellant's Jurisdictional Statement at Appendix C on page 51a.

QUESTION PRESENTED

Does Act 372 violate the Establishment Clause of the First Amendment to the United States Constitution as a law respecting the establishment of religion?

STATEMENT OF THE CASE

The parties in this case are the Pequea Valley School District, Appellant, and the Pennsylvania Department of Education, Appellee. Appellee has a statutory duty to uphold the laws of the Commonwealth relating to public and nonpublic schools.

The Appellant School District, after the effective date of Act 372, instituted a local school board policy, which provided transportation to nonpublic school pupils to schools located within the public school district boundaries. It denied identical transportation to pupils to and from nonpublic schools located outside the public school district boundaries but within the statutory ten mile limit.

Appellant responded to the Appellee's order to show cause why enforcement action should not be taken against it by contending that Act 372 was unconstitutional. After an administrative hearing in November, 1974, the Department issued a final order in September, 1976, finding the district to be in violation of Act 372. The Secretary of Education ordered the Appellant to transport all eligible nonpublic school pupils to and from the schools in which they were lawfully enrolled if these schools were within the public school district or outside the district and within the statutory ten mile limitation. The district appealed this order to the Commonwealth Court of Pennsylvania. The Commonwealth Court affirmed the order of the Department's Secretary of Education

by opinion and order dated July 5, 1978. The district appealed this opinion and order in the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania affirmed the opinion and order of the court below on January 24, 1979. *Pequea Valley School District v. Commonwealth of Pennsylvania, Department of Education*, 397 A.2d 1154 (1979).

MOTION TO DISMISS

The Case Presents No Substantial Federal Question

This appeal raises the question of the constitutionality of Pennsylvania's "Pupil Transportation" Act (Act of December 29, 1972, No. 372, P.L. 1726, 24 P.S. §13-1361, as amended).

This statute (hereinafter referred to as "Act 372") provides the same transportation benefits to both public and nonpublic pupils, namely, transportation to and from the schools in which they are enrolled. For purposes of reimbursement by the state, Act 372 establishes a maximum ten mile limitation on the transportation provided by public school districts to pupils enrolled in nonpublic schools. Insofar as the statute provides transportation "to and from school" for all resident pupils, the transportation benefits are the same for public and nonpublic school students alike.

Since the case of *Everson v. Board of Education of Ewing Township, N.J.*, 330 U.S. 1 (1946), it has been well established that the Supreme Court will only strike down a state statute if it is clearly beyond the state's constitutional power. Act 372 is within the parameters of *Everson* and has been upheld in both of Pennsylvania's appellate courts.

Appellant's assertion that the recent decision of two United States district courts have significant bearing on this case is misplaced. *Americans United for*

Separation of Church and State v. Benton, 413 F. Supp. 955 (S.D. Iowa, 1975), is distinguishable on its facts. That case involved a statute which sought to provide transportation to students in contravention of a statutory prohibition against transportation of public school pupils across district boundaries. There is no such statutory prohibition in Pennsylvania. In fact, public school pupils in Pennsylvania may attend schools in other states (Public School Code of 1949, as amended, P.L. 30, 24 P.S. §13-1315) and in other districts (*Id.* at 24 P.S. §13-1313).

The second case which came from Rhode Island can be distinguished on similar grounds. *Members of the Jamestown Committee v. Schmidt*, 427 F. Supp. 1338 (D. R.I., 1977). Under the Rhode Island school laws, public school children could be transported "only within the local school districts." As stated above, this is not the situation under the Pennsylvania school laws. Also, in *Schmidt* the District Court pointed with favor to "the requirement announced in *Everson* . . . that benefits be provided in common, substantially equally, without distinctions between children attending sectarian and public schools." *Id.* at 1348. Thus, neither *Benton* nor *Schmidt*, creates any conflict with this Court's decision in *Everson*.

Finally, Appellant's request that this Court's prior decision in *Everson* be reconsidered would upset the long-established constitutional precedent of "benevolent neutrality," *Walz v. Tax Commission*, 397 U.S. 664 (1970), and overturn the practice of many states to legislate health and safety measures for children and to provide constitutionally permitted state pro-

grams such as "[b]us transportation . . . supplied in common to all students." *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971).

MOTION TO AFFIRM

A previous Pennsylvania statute permitting the transportation of nonpublic school pupils was challenged in this Court in 1967 on Establishment Clause grounds and this Court dismissed the appeal. *Rhoades v. School District of Abington Township,* 389 U.S. 11 (1967), and denied a petition for *certiorari* in the companion case, *Womell v. Matters,* 389 U.S. 46 (1967).

As recently as 1970, this Court discussed and cited with favor its earlier *Everson* case in *Walz.* Even more recently, in 1977, this Court decided another pupil transportation case, had the opportunity to reverse its holding in *Everson* and did not do so. *Wolman v. Walter,* 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed. 2d 714 (1977). Nevertheless, Appellant is now asking this Court to reverse itself and the law pronounced in the *Everson* case.

Wherefore, Appellee respectfully submits that the questions upon which this cause depends are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment and order entered in this cause by the Supreme Court of Pennsylvania.

Respectfully submitted,
PATRICIA A. DONOVAN
Deputy Attorney General

NORMAN J. WATKINS
Deputy Attorney General
Chief of Civil Litigation
EDWARD G. BIESTER, JR.
Attorney General
Counsel for Appellee

May 22, 1979